

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-06
Support Mechanism	)	
	)	
Request for Review by Charter	)	Application Nos. 583371, 583701,
Communications, Inc. (d/b/a Time Warner	)	624714 and 651887; Funding
Cable Business LLC) of Decision by the	)	Request Nos. 1617184, 1618225,
Universal Service Administrator	)	1723535 and 1868150

**REQUEST FOR REVIEW**

Matthew A. Brill  
Elizabeth R. Park  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004

April 24, 2018

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	2
QUESTIONS FOR REVIEW .....	3
STATEMENT OF FACTS .....	4
ARGUMENT .....	7
I. Recovery of Funds for Funding Years 2007, 2008, and 2009 is Time-Barred.....	7
A. Rescission of E-Rate Funding More Than Five Years After the Conclusion of USAC’s Investigation and Restoration of Funding Is Inconsistent with the Commission’s Policy and Would Be Arbitrary and Capricious .....	7
B. USAC’s Belated Rescission Decision, if Upheld, Would Violate the Applicable Statute of Limitations .....	10
II. The Competitive Bidding Process Was Fair and Open, and Was Not Tainted by any Gift .....	12
III. Equitable Considerations Also Warrant Reversal of USAC’s Rescission Decision or, in the Alternative, a Waiver.....	17
IV. While There is No Lawful Basis to Require Repayment of any Portion of the 2007, 2008, or 2009 Funding Awards, in No Event May Charter be Held Jointly and Severally Liable for Alleged Violations of Gift Restrictions.....	20
CONCLUSION.....	21

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-06
Support Mechanism	)	
	)	
Request for Review by Charter	)	Application Nos. 583371, 583701,
Communications, Inc. (d/b/a Time Warner	)	624714 and 651887; Funding
Cable Business LLC) of Decision by the	)	Request Nos. 1617184, 1618225,
Universal Service Administrator	)	1723535 and 1868150

**REQUEST FOR REVIEW**

Pursuant to sections 54.719(b) and 54.722 of the Commission's rules,<sup>1</sup> Charter Communications, Inc. ("Charter")<sup>2</sup> respectfully requests that the Commission review the decisions of the Universal Service Administrative Company ("USAC") denying funding under the Schools and Libraries universal service program ("E-rate") for Funding Request Numbers ("FRN") 1617184, 1618225, 1723535, and 1868150.<sup>3</sup>

---

<sup>1</sup> 47 C.F.R. §§ 54.719(b), 54.722.

<sup>2</sup> Charter submits this request for review on behalf of subsidiaries over which it acquired control through the May 2016 merger with Time Warner Cable Inc. Prior to February 2016, Time Warner Cable provided voice and data services to schools and libraries in North Carolina through its subsidiary Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)"), Service Provider Identification Number 143027380. In February 2016, TWCIS (NC)'s Service Provider Identification Number was consolidated with that of another subsidiary, Time Warner Cable Business LLC ("TWCB"), Service Provider Identification Number 143048275. Charter continues to provide E-rate services in North Carolina through TWCB, now a wholly owned subsidiary of Charter. For purposes of clarity, Time Warner Cable Inc. and its former subsidiaries, TWCIS (NC) and TWCB, are collectively referred to throughout as "TWC."

<sup>3</sup> See Notice of Commitment Adjustment Letters for FY 2007 from USAC to Marcia Evans (Jun. 21, 2017) ("2007 COMAD Letters") (Ex. A); Notice of Commitment Adjustment Letters for FY 2008 from USAC to Marcia Evans (Jun. 21, 2017) ("2008 COMAD Letter") (Ex. B); Notice of Commitment Adjustment Letters for FY 2009 from USAC to Marcia Evans (Jun. 21, 2017) ("2009 COMAD Letter") (Ex. C). USAC previously issued a Commitment Adjustment Letter for FY 2011 based on the same gift of two sports tickets, and Charter filed a request for Commission

## INTRODUCTION AND SUMMARY

This request for review arises from USAC's inexplicable decision to rescind more than \$2 million in E-rate funding more than *10 years* after TWC gave two college basketball tickets to an employee of the Robeson County Public School District ("Robeson"), notwithstanding that in August 2011 USAC had completed a 14 month-long Special Compliance Review regarding this very same issue and restored full funding without any findings that Robeson or TWC had violated any Commission rule or other legal requirement. The unchallenged record further shows that the gift of two college basketball tickets came two weeks after Robeson had selected TWC's bid, which was dramatically lower than, and technically superior to, the competing bid received by Robeson. The tickets, therefore, could not possibly have impacted the award of the contract.

Nothing has changed since USAC conducted its Special Compliance Review in 2010-11. Nevertheless, in June 2016, USAC merely asserted the same claims it investigated in June 2010, for which it found no violation in August 2011. USAC asserted no new grounds or any different facts than those it examined in August 2011. Rather, USAC ignored its previous findings and adopted contradictory ones without justification. USAC's shocking about-face, finding that Robeson and TWC now must forfeit substantial E-rate awards despite the absence of any new facts or evidence of any failure of competitive bidding, is utterly lawless. USAC's actions cannot be squared with the Commission's policy of completing funding review proceedings within five years after the final delivery of services for the applicable funding year, the independent statute of limitations for imposing penalties of this type, the Administrative Procedure Act ("APA"), and fundamental principles of equity and due process.

---

review of that decision in December 2016. *See Request for Review by Charter Communications, Inc. (d/b/a Time Warner Cable Business LLC) of Funding Decisions by the Universal Service Administrator*, CC Docket No. 02-06, Application No. 813171 (filed Dec. 12, 2016) (pending).

## QUESTIONS FOR REVIEW

After USAC issued the Commitment Adjustment Letters at issue, Charter filed a timely request for review by USAC, and USAC denied Charter's appeal.<sup>4</sup> Accordingly, Charter is a "party aggrieved" by USAC's action and is entitled to seek review by the Commission.<sup>5</sup>

The questions presented for review are as follows:<sup>6</sup>

- (1) Whether the rescission of E-rate funding more than five years after USAC concluded an investigation of the competitive bidding process and restored funding is arbitrary and capricious;
- (2) Whether the rescission of E-rate funding more than five years after USAC concluded an investigation of the competitive bidding process and restored funding is time-barred under the applicable statute of limitations;
- (3) Whether there is substantial evidence to support a finding that TWC's gift of two sports tickets violated the Commission's competitive bidding rules, where TWC submitted the lowest bid and Robeson's contract officer attested that the tickets had no impact on TWC's selection as E-rate vendor;
- (4) Whether equitable considerations warrant the restoration of funding, including through the grant of a waiver of the competitive bidding rules, to the extent necessary; and
- (5) Whether Charter can be held jointly and severally liable for a reimbursement requirement when it is not alleged to have made any false certifications or committed any rule violation.

While this appeal naturally focuses on the impact of USAC's legal errors on Charter, it also bears emphasis that the approach taken by USAC, if not reversed by the Commission, would result in an undue and unjustified hardship on one of North Carolina's poorest school districts. The imposition of strict liability for an asserted violation of competitive bidding rules more than a

---

<sup>4</sup> See USAC, Administrator's Decision on Appeal – Funding Year 2009-2010 (Feb. 23, 2018) (Ex. J); USAC, Administrator's Decision on Appeal – Funding Year 2008-2009 (Feb. 23, 2018) (Ex. K); USAC, Administrator's Decision on Appeal – Funding Year 2007-2008 (Feb. 23, 2018) (Ex. L) (collectively, "Administrator's Decision on Appeal").

<sup>5</sup> See 47 C.F.R. § 54.719(b).

<sup>6</sup> See *id.* § 54.721(b)(3).

decade ago also would deter other service providers from competing to serve E-rate customers. At a minimum, these equitable considerations justify a waiver if the Commission decides to uphold USAC's finding of a rule violation, particularly given the absence of evidence that the gift of sports tickets here had any effect on the competitive bidding process.

Therefore, Charter respectfully requests that the Commission grant its request for review and direct USAC to restore funding for the above-captioned funding requests.<sup>7</sup>

### **STATEMENT OF FACTS**

Charter's request for review arises from USAC's February 23, 2018 decision denying Charter's appeal of USAC's determination to rescind awards of \$699,480.00 and \$45,758.52 in E-rate funding to Robeson for Funding Year 2007, \$774,000.00 for Funding Year 2008, and \$791,882.61 for Funding Year 2009. Remarkably, USAC issued this determination in Commitment Adjustment ("COMAD") letters on June 21, 2017 notwithstanding that it completed a 14-month compliance review between June 2010 and August 2011—examining the very same facts and issues that formed the basis of the June 21, 2017 COMAD letters—and reinstated funding after finding no noncompliance.

On December 21, 2006, Robeson filed FCC Form 470 (Application Number 385280000611565) commencing a competitive bidding process for a five-year contract to purchase broadband Internet access service. Robeson received two competing proposals for service—one from TWC (now part of Charter) and one from a local competitor, School Link. School Link's bid was more than *fifty percent higher* than TWC's bid (TWC submitted a bid of

---

<sup>7</sup> Charter notes that, during the pendency of this appeal, Charter cannot be deemed delinquent for any failure to pay any outstanding balance associated with this dispute. See 47 C.F.R. § 1.1910(b)(3)(i).

\$804,000, versus School Link's bid of \$1,268,000).<sup>8</sup> Robeson's E-rate Bid Assessment Worksheet indicates that, based on that dramatic price differential, together with the school district's determination that TWC was the more qualified bidder, and its bid was technically superior, Robeson identified TWC as the selected vendor on January 22, 2007.<sup>9</sup> Two weeks later, on February 6, 2007 Robeson signed a multi-year contract with TWC for broadband Internet access service, with a voluntary extension provision expiring on June 30, 2012.<sup>10</sup> On February 7, 2007, Robeson filed FCC Form 471 (Application Number 583371), requesting funding for the first year of that contract.

On or about February 3, 2007, TWC gave Everette Teal, Robeson's Director of Technology, two tickets to a college basketball game at the PNC Arena in Raleigh, North Carolina—a courtesy TWC routinely extended to corporate and other enterprise customers at the time.<sup>11</sup> TWC's records from 2007 are incomplete and the relevant personnel are no longer employed by Charter, but email correspondence from the relevant time period indicates that TWC informed Teal that the tickets were valued at \$35 each.<sup>12</sup> In response to a compliance inquiry from USAC in 2009, TWC informed USAC that it considered the tickets to have a fair market value of

---

<sup>8</sup> E-rate Bid Response Log, Form 470 No. 385280000611565 at 1 ("Bid Response Log") (Ex. D).

<sup>9</sup> *Id.*

<sup>10</sup> See Robeson County Public Schools, Schools and Libraries Universal Service, Description of Services Ordered and Certification Form 471, at 5 (Mar. 24, 2011) (Ex. I).

<sup>11</sup> See Letter from TWC to USAC Regarding Special Compliance Review at 1-2 (Oct. 13, 2009) (Ex. H). As TWC explained to USAC in that letter, TWC amended its policy in 2009 to prohibit its sales personnel from extending sports tickets or other gifts to E-rate participants.

<sup>12</sup> Email from Andrew Willis, TWC Business to Everette Teal, Robeson Public Schools, (July 9, 2010) ("Willis Email") (Ex. E).

\$150 each.<sup>13</sup> Charter has been unable to determine 10 years after the fact whether the contemporaneous \$35 estimate or the \$150 estimate two years later was accurate.

In June 2010, USAC notified Robeson that its funding in connection with the TWC contract was subject to a Special Compliance Review. USAC suspended Robeson's access to funding at that same time. In August 2011, however, USAC restored funding of Robeson's broadband Internet access services once it had completed the compliance investigation without making any findings of noncompliance. Some six years later, on June 21, 2017, USAC reversed course and, without explanation, demanded that Robeson (and/or Charter) repay the funds that had been disbursed for Funding Years 2007, 2008, and 2009.

Notably, Robeson County is one of North Carolina's poorest and most diverse counties, with more than a third of its population living in poverty. Robeson's 41 public schools—all of which receive Title I funding—serve approximately 24,000 students, more than 87% of whom receive free or reduced price meals.<sup>14</sup> In October 2016, Hurricane Matthew struck this already-struggling county, displacing hundreds and bringing “more misery” to a county that has seen “years of things leaving ... manufacturing plants, jobs, payroll, [and] people.”<sup>15</sup> Hurricane

---

<sup>13</sup> See Ex. H, Letter from TWC to USAC Regarding Special Compliance Review at 4.

<sup>14</sup> *Community, Public Schools of Robeson County*, <http://www.robeson.k12.nc.us/Page/675> (accessed Aug. 21, 2017); *Title I Schools 2015-16*, North Carolina Department of Public Instruction, <http://www.dpi.state.nc.us/docs/program-monitoring/titleIA/2015-16.xls> (accessed Aug. 21, 2017); *Free & Reduced Meals Application Data, 2013-14*, <http://www.ncpublicschools.org/docs/fbs/resources/data/freereduced/2013-14freereduced.xls> (accessed Aug. 21, 2017).

<sup>15</sup> Martha Quillin, *Misery now, a struggle ahead for Robeson County after flooding from Hurricane Matthew*, THE NEWS & OBSERVER (Oct. 15, 2016), <http://www.newsobserver.com/news/state/north-carolina/article108488912.html>.

Matthew left Robeson’s schools closed for three weeks and destroyed many of the school district’s records.<sup>16</sup>

## **ARGUMENT**

### **I. RECOVERY OF FUNDS FOR FUNDING YEARS 2007, 2008, AND 2009 IS TIME-BARRED**

USAC’s issuance of the COMAD letters seeking recovery of disbursed funds from the 2007, 2008, and 2009 funding years is untimely—and doubly so, under both the Commission’s own policy and the applicable statute of limitations.

#### **A. Rescission of E-Rate Funding More Than Five Years After the Conclusion of USAC’s Investigation and Restoration of Funding Is Inconsistent with the Commission’s Policy and Would Be Arbitrary and Capricious**

First, the effort to recover funds based on a violation that allegedly occurred more than a decade ago is starkly at odds with the policy adopted in the *E-Rate Fifth Report and Order*.<sup>17</sup> That policy established a *five-year* period for completing E-rate audits and compliance investigations, “in order to provide beneficiaries with certainty and closure in the E-rate applications and funding process.”<sup>18</sup> In particular, under that policy, any such audit or investigation had to be completed within five years of the final delivery of service for the funding year in question.<sup>19</sup>

Disregarding this policy and reopening the matter far more than five years after the funding years at issue—and, critically, ordering the rescission of funding six years after completing a Special Compliance Review that found no violation—constitutes a grossly arbitrary and capricious

---

<sup>16</sup> *Familiarity key as Robeson County students return 3 weeks after flood*, WRAL (Oct. 31, 2016), <http://www.wral.com/robeson-county-schools-reopen-3-weeks-after-hurricane-matthew/16179918/>.

<sup>17</sup> *Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order, 19 FCC Rcd. 15808 (2004) (“*E-Rate Fifth Report and Order*”).

<sup>18</sup> *Id.* at ¶ 32.

<sup>19</sup> *Id.* at ¶¶ 32, 33.

departure from the Commission’s established policy.<sup>20</sup> Supreme Court precedent requires the Commission to “display awareness that it *is* changing position,” and to provide “good reasons” for doing so, rather than “simply disregard[ing] rules that are still on the books.”<sup>21</sup> But here, USAC simply ignored the Commission’s policy of pursuing the recovery of E-rate funding within a five-year period, as well as the underlying interest in ensuring certainty and closure.

USAC noted that the Commission recently stated that the audit limitation period is a “policy preference” rather than an “absolute bar to recovery,”<sup>22</sup> but this case is readily distinguishable because here USAC *completed* its investigation in 2011, found no violation, and reinstated funding. Even assuming it would have been permissible for USAC to take more than five years following the funding years at issue to complete its Special Compliance Review (which it was not), there is no plausible justification—let alone a “good reason”—for revisiting a settled outcome more than six years after USAC concluded its thorough compliance inquiry and decided to restore funding. Indeed, far from promoting certainty and closure, as the *E-Rate Fifth Report*

---

<sup>20</sup> The Commission extended the records-retention period to 10 years in 2014, *see Modernizing the E-rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 8870 (2014), which arguably could justify extending the permissible time frame for audits or investigations commenced *after* that date. But here, the five-year limitation period for the 2007 funding year (which ended on June 30, 2008) expired *well before* the modification of the retention period became effective. Similarly, the limitation period for the 2008 funding year (which ended on June 30, 2009) expired before the modification of the retention period took effect in November 2014. Although the modification of the retention period occurred prior to the expiration of the limitation period for the 2009 funding year (which ended on June 30, 2010), USAC’s investigation commenced prior to the date of the modification and pertained to an alleged violation that occurred in 2007. Accordingly, USAC’s effort to rescind funding commitments for Funding Year 2007, 2008, and 2009 is plainly at odds with the policy that applied during the relevant time frame.

<sup>21</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (emphasis in original); *see also Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015).

<sup>22</sup> Administrator’s Decision on Appeal at 2 (citing *Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc., Palatine, Illinois*, Memorandum Opinion and Order, 32 FCC Rcd. 963 ¶ 9 (2017)).

*and Order* appropriately calls for, such an arbitrary reopening of a long-resolved matter would powerfully undermine that objective. If USAC’s decision to change its mind six years after finding no violation and restoring funding were upheld by the Commission, service providers would be left entirely unsure whether they can *ever* rely on E-Rate funding awards. At a minimum, such a determination would be destabilizing.<sup>23</sup>

That USAC is seeking to claw back funds for which it previously found no violation, and restored without any permissible legal or factual basis, compounds the punitive as well as the arbitrary and capricious nature of its action. The Supreme Court has explained that an agency fails to engage in reasoned decision making where a “new policy rests upon factual findings that contradict those which underlay its prior policy.”<sup>24</sup> Yet USAC’s finding of a competitive bidding violation here contradicts its earlier conclusion that the gift of two basketball tickets did *not* constitute a violation, without any new or different facts having come to light. It is “arbitrary [and] capricious to ignore such matters.”<sup>25</sup> Moreover, USAC’s action also undermines Charter/TWC’s legitimate reliance interests—another factor cited by the Supreme Court as requiring a more substantial justification for a change of course.<sup>26</sup> Once USAC completed its Special Compliance Review in 2011, TWC resumed its provision of services to Robeson with a reasonable expectation that USAC would provide the committed funding without later seeking to claw it back. Upsetting

---

<sup>23</sup> Statutes of limitations are intended to “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). They provide “security and stability to human affairs.” *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); *see also Adams v. Woods*, 6 U.S. 336, 342 (1805) (actions “brought at any distance of time” would be “utterly repugnant to the genius of our laws.”).

<sup>24</sup> *Fox*, 556 U.S. at 515.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

such reliance interests without any justification for the about-face is a paradigmatic example of arbitrary and capricious decision making.<sup>27</sup>

**B. USAC’s Belated Rescission Decision, if Upheld, Would Violate the Applicable Statute of Limitations**

The belated effort by USAC (and any such effort by the Commission) to require repayment of funds also falls outside the five-year federal statute of limitations for any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.”<sup>28</sup> Under recent Supreme Court precedent, rescission of committed funding and recovery of disbursed funds to remedy a purported violation of the Commission’s E-rate rules constitutes a “penalty.” In *Kokesh v. SEC*, the Court unanimously rejected the SEC’s argument that its order to disgorge funds was not a penalty subject to the five-year limitations period, because (i) the “wrong sought to be redressed is a wrong to the public,” rather than a wrong to an individual; and (ii) the recovery is “sought for the purpose of punishment, and to deter others from offending in like manner— as opposed to compensating a victim for his loss.”<sup>29</sup> Those factors confirm that requiring Charter to repay funds based on the alleged violation by Robeson (even apart from the joint and several liability problems discussed below, *infra* Section IV) would likewise constitute a penalty that must be imposed within five years of the alleged violation.

In particular, the first prong is satisfied, because the “wrong” at issue is an alleged violation of the Commission’s E-rate rules (not harm to any individual), and the funds would be returned to USAC (rather than to compensate any individual). In addition, with respect to the second prong,

---

<sup>27</sup> See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-27 (2016) (reversing agency decision pursuant to *Fox*, 556 U.S. at 515).

<sup>28</sup> 28 U.S.C. § 2462.

<sup>29</sup> *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) (internal quotation marks and citation omitted).

seeking recovery from Charter in this case has the effect of punishing the past action of providing the sports tickets, which was *not* a violation of any rule in effect at the time the gift was made. Moreover, the strict-liability approach adopted by USAC could only be justified as an interest in “deter[ring] others from offending in [a] like manner,”<sup>30</sup> given the absence of any evidence that the gift of sports tickets had any impact whatsoever on the competitive bidding process. Indeed, because the record shows that the gift occurred after TWC was selected as a vendor, and because only Robeson is alleged to have violated the Commission’s rules, it is all the more plain that any recovery of funds from TWC would be intended to deter other service providers from making such gifts.

In a recent high-cost USF recovery action against Blanca Telephone Company, the Commission concluded that *Kokesh* was inapplicable because the basis for seeking the repayment of funds was an improper calculation of support, and thus was not a penalty.<sup>31</sup> Here, by contrast, the recovery sought from Charter as an E-rate service provider has a clear punitive purpose and effect, particularly given that Charter itself is not alleged to have violated any Commission rule. Indeed, USAC’s unexplained—and inexplicable—decision to reverse course six years after concluding that no violation occurred, and accordingly restoring funding, only serves to underscore the punitive nature of its ruling that Charter must forfeit more than \$2 million.<sup>32</sup> Moreover, the Supreme Court in *Kokesh* rejected the argument advanced in the *Blanca* proceeding—that “disgorgement is not punitive but ‘remedial’ in that it ... ‘restor[es] the status

---

<sup>30</sup> *Id.*

<sup>31</sup> *Blanca Tel. Co.*, Memorandum Opinion and Order and Order on Reconsideration, FCC 17-162, CC Docket No. 96-45, 2017 WL 6334374, ¶¶ 44-45 (rel. Dec. 8, 2017).

<sup>32</sup> *See id.*, Statement of Commissioner Michael O’Rielly (acknowledging the need to take “swift action to recoup funding” and expressing concern “that USAC has been attempting to recoup certain overpayments from a decade ago”).

quo.”<sup>33</sup> Just as with the disgorgement ordered by the SEC, rescinding E-rate funding from Charter at this stage would leave the company worse off than if the funding had never been authorized in the first place, because TWC provided service in reliance on the funding award and would not have done so—at significant cost—had it known the funding could be arbitrarily taken away years after the fact.

## **II. THE COMPETITIVE BIDDING PROCESS WAS FAIR AND OPEN, AND WAS NOT TAINTED BY ANY GIFT**

Even if USAC’s COMAD letters were not time-barred (which they were under applicable Commission and Supreme Court precedent), there is no basis—much less substantial evidence—to support the conclusion that Robeson or TWC violated the Commission’s competitive bidding rule. USAC has never explained how TWC’s gift of two college basketball tickets purportedly resulted in a violation of the Commission’s competitive bidding rule (especially given its determination in 2011 after its Special Compliance Review that there was no basis for any adverse action). The Commission’s competitive bidding rule requires applicants to conduct their bidding processes in a fair and open manner such that no bidders receive an unfair advantage.<sup>34</sup> No such advantage accrued to TWC during the bidding process at issue. Consistent with the Commission’s rules, Robeson held a fair and open competition in 2006 to seek the lowest cost provider of broadband Internet access services at specified speed thresholds. Robeson properly filed an FCC

---

<sup>33</sup> *Kokesh*, 137 S. Ct. at 1644.

<sup>34</sup> See, e.g., *Schools and Libraries Universal Service Support Mechanism*, Sixth Report and Order, 25 FCC Rcd. 18762 ¶ 85 (2010) (codifying the requirement that the E-rate competitive bidding process be fair and open); 47 C.F.R. § 54.503(a); see also *Requests for Review of Decisions of the Universal Service Administrator by Hospital Networks Management, Inc. Manchaca, Texas*, Order, 31 FCC Rcd. 5731, 5733 ¶ 4 (WCB 2016) (“The Commission has consistently stated that the competitive bidding process must be fair and open and must not have been compromised because of improper conduct by the applicant, service provider, or both parties. In essence, all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process.”).

Form 470 seeking bids, the request for proposal was available to all potential bidders for the duration of the bidding process, and Robeson waited the minimum of 28 days before making a commitment with its selected service provider.<sup>35</sup> There is no evidence remotely suggesting that any bidders or potential bidders were denied access to the same information or were treated in a disparate manner throughout the procurement process.

In response to its request for proposal, Robeson received two bids. As noted above, School Link and TWC competed for the contract, and TWC's bid was \$464,000 lower than the competitor's—a differential of more than 50 percent. In addition, Robeson determined that TWC was more qualified and that its submission was technically superior.<sup>36</sup> The Commission's rules plainly require price to be the primary factor in awarding E-rate contracts.<sup>37</sup> Robeson has confirmed that this large price differential indeed was the dispositive factor, and that TWC's gift of two basketball tickets had *no effect* on the selection process.<sup>38</sup> Robeson identified TWC as the lowest cost provider, and thus the winning bidder, on its E-rate Bid Assessment Worksheet on January 22, 2007—two weeks before the date of the basketball tickets. As such, TWC won a fair and open competitive bidding process, and Robeson acquired the most cost-effective services available to it, enabling one of the “nation's ... communities, to obtain access to modern

---

<sup>35</sup> See 47 C.F.R. § 54.503(c); Decl. of Everette Teal at ¶ 3.

<sup>36</sup> See Ex. D, Bid Response Log at 2.

<sup>37</sup> See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District El Paso, Texas et al.*, Order, 18 FCC Rcd. 26407 ¶ 50 (2003) (“*Ysleta Order*”) (holding that “price must be the primary factor in considering bids”).

<sup>38</sup> See Decl. of Teal at ¶¶ 4, 6; Schools and Libraries Universal Service, Services Ordered and Certification Form at 5, OMB 3060-0806 (November 2004) (FCC Form 471).

telecommunications and information services for educational purposes, consistent with the statute.”<sup>39</sup>

Robeson did not cede control of the bidding process to TWC, nor is there any evidence of an inappropriate relationship between TWC and Robeson. Significantly, there is no evidence or even allegation that TWC gave any gift to Robeson with the intention to induce Robeson to select TWC as a service provider. There is simply no evidence that the tickets had any bearing on the bidding process.<sup>40</sup> TWC submitted a bid that was dramatically lower than the alternative proposal available to Robeson.<sup>41</sup> Robeson awarded the contract based on that obviously superior value proposition.<sup>42</sup>

Nor did TWC’s gift of sports tickets violate state or local procurement rules. While North Carolina law, as of 2002, contained a general prohibition against bribery—*e.g.*, providing gifts or similar rewards in exchange for awarding public contracts—that prohibition has no applicability to the facts here, where any event tickets supplied were of minor value and offered with the goal of building and improving relationships, not to receive special consideration in the award of a contract.<sup>43</sup> There is no evidence cited by USAC or uncovered by TWC in its investigation that any gifts were offered by TWC or accepted by the school district with any express or implied *quid pro quo* understanding or request.

---

<sup>39</sup> See *Ysleta Order*, 18 FCC Rcd. 26406 at ¶ 4.

<sup>40</sup> Cf. *Network Services Solutions, LLC, Scott Madison*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd. 12238, 12253-54 ¶¶ 46-49 (2016) (finding a competitive bidding rule violation where Network Services Solutions, LLC gave the applicant a server valued at roughly \$10,000 in consideration for extending the parties’ contract).

<sup>41</sup> See Ex. D, Bid Response Log at 1.

<sup>42</sup> See Decl. of Teal at ¶ 4.

<sup>43</sup> See N.C. Gen. Stat. § 14-234(a)(3); N.C. Gen. Stat. § 133-32’s prohibition of “gifts” and “favors” applies only in the context of public works contracts and, accordingly, has no application here.

Although neither Charter nor Robeson possesses complete documentation from nearly ten years ago,<sup>44</sup> the evidence available today indicates that, in 2007, the basketball tickets provided by TWC were valued at \$35 each—an amount that complied with Robeson’s gift policy. The Robeson Board of Education had gift restrictions in place in 2007 that required the school board to grant written approval for all gifts of \$250 or greater.<sup>45</sup> Teal, the Robeson employee who received the tickets, believed in good faith that they were valued well below this threshold, and accordingly did not have any basis to seek written approval for a gift valued above \$250. Specifically, e-mail records indicate that TWC informed Mr. Teal that the tickets were valued at \$35 each.<sup>46</sup> As noted above, TWC indicated to USAC (unbeknownst to Robeson) in 2009 that the tickets had a value of \$150 each.<sup>47</sup> Even if that higher valuation were accurate, Robeson’s reliance on the lower estimate provided to it by TWC—the only such evidence available to Robeson—made its certification of compliance with Board of Education policy accurate, to the best of Robeson’s knowledge. There is no basis to hold that a service provider’s subsequent provision of information that was not available to the E-rate applicant somehow renders the applicant’s certification false when made.

In any event, action regarding any purported violation of state or local procurement rules that might have occurred in 2007 would be time-barred, because the state-law statute of limitations

---

<sup>44</sup> Robeson’s school administration building in Lumberton, NC and a district warehouse took on several feet of water during Hurricane Matthew. Records from the E-rate funding years that are the subject of the instant appeal were stored in the warehouse and destroyed by the flood. *See* Jess Clark, *Devastated After Hurricane Matthew, Robeson County Schools Begin to Pick Up the Pieces*, WUNC (Oct. 21, 2016) (Ex. F).

<sup>45</sup> *See* Excerpt from Robeson Board of Education Policies (Ex. G).

<sup>46</sup> *See* Ex. E, Willis Email.

<sup>47</sup> *See supra* at 5-6.

for any such violations has long since expired.<sup>48</sup> Given that there can be no enforceable violation of state or local procurement law more than a decade after an allegedly improper gift, neither USAC nor the Commission can rely on any such state or local “violation” as a basis for rescinding funding here. Any such reliance would exceed the Commission’s authority and would be arbitrary and capricious. Indeed, given the D.C. Circuit’s recent reaffirmation that the Commission lacks authority even to *adjudicate* state-law claims, it plainly cannot *create* a state-law claim that is time-barred as a matter of state law.<sup>49</sup>

In the absence of evidence that there was any actual impact on competitive bidding or any false certification, USAC appears to be applying a strict liability standard whereby any alleged violation of local gift rules automatically constitutes a violation of the Commission’s competitive bidding rule. This approach is inconsistent with Commission precedent, which does not impose strict liability for competitive bidding violations whenever an applicant receives gifts from a service provider.<sup>50</sup>

---

<sup>48</sup> See N.C. Gen. Stat. § 1-52(2) (three-year statute of limitations applicable generally for “liability created by statute”); N.C. Gen. Stat. § 15-1 (two-year statute of limitations generally governing misdemeanors).

<sup>49</sup> See *All American Tel. Co., Inc. v. FCC*, 867 F.3d 81, 94-95 (D.C. Cir. 2017) (holding that the Commission lacks jurisdiction to adjudicate state-law claims).

<sup>50</sup> See *Requests for Review of Decisions of the Universal Service Administrator by Kings Canyon Unified School District Reedley, CA, et al.*, 27 FCC Rcd. 4084 ¶ 2 (WCB 2012) (“Kings Canyon Order”) (granting request for review of USAC decision and concluding that Kings Canyon “conducted a fair and open competitive bidding process” in accordance with the E-rate procedures and rules that existed at the time of the bidding process. “At this time, we do not find evidence of waste, fraud and abuse in the record. Therefore, we conclude that Kings Canyon’s receipt of [] gifts did not impede the competitive bidding process.”). See also *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (invalidating Commission’s imposition of a strict liability standard for actual-authorization requirement under 47 U.S.C. § 258, “[s]ince section 258 itself contains no actual-authorization requirement”).

To the extent that USAC has relied on the Commission’s *current* rule restricting gifts to E-rate applicants as a basis for rescinding funding in this case, such reliance is impermissible. Section 54.503(d) of the Commission’s rules prohibits E-rate applicants from soliciting or accepting gifts worth more than \$20 and also prohibits E-rate service providers from offering or providing such gifts, subject to an aggregate limit of \$50 per recipient per year.<sup>51</sup> But the Commission did not adopt that rule until 2010, and it did not go into effect until January 3, 2011.<sup>52</sup> The Wireline Competition Bureau has held that USAC reviews must be undertaken “in accordance with the Commission’s E-rate competitive bidding rules that exist *at the time*.”<sup>53</sup> Accordingly, USAC is foreclosed from retroactive application of Section 54.503(d) with respect to sports tickets given in 2007.

### **III. EQUITABLE CONSIDERATIONS ALSO WARRANT REVERSAL OF USAC’S RESCISSION DECISION OR, IN THE ALTERNATIVE, A WAIVER**

In addition to the legal defects outlined above, bedrock principles of equity—including, in particular, the interest in repose—undermine any effort to claw back funding more than a decade after the alleged competitive bidding violation occurred. After completing its Special Compliance Review without any finding of non-compliance and treating the matter as settled for six years thereafter, USAC now seeks to claw back over \$2 million based on a gift of college basketball

---

<sup>51</sup> 47 C.F.R. § 54.503(d).

<sup>52</sup> See *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, 75 Fed. Reg. 75,393 (Dec. 3, 2010).

<sup>53</sup> *Requests for Review of Decisions of the Universal Service Administrator by Dimmitt Independent School District Dimmitt, Texas, et al.*, Order, 26 FCC Rcd. 15581 ¶ 10 (2011) (emphasis added); see also *Kings Canyon Order*, 27 FCC Rcd. 4084 at ¶ 2 (noting that, regardless of if the “analysis of this matter could be different under our current rules,” the Commission’s “clear guidelines on permissible gifts ... became effective on January 3, 2011”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that a statutory grant of legislative rulemaking authority does not “encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”).

tickets worth, at most, \$300. For USAC to impose such a draconian, strict-liability penalty on a service provider and applicant so long after the fact, with no new evidence coming to light, is unreasonable and unduly punitive. In addition to violating the APA and applicable limitations periods, *see supra* Section I, holding Charter liable would also violate core principles of equity and repose by upending Charter’s reasonable expectation that USAC would provide the funding it committed to provide—especially after completing its Special Compliance Review in 2011 without any finding of noncompliance. Inducing service providers to undertake contractual obligations to provide critical services to schools and libraries in reliance on E-rate grants, and then reversing course years later, ultimately would deter service providers from competing to serve E-rate customers in the first place. Relatedly, such disincentives for service providers to participate in E-rate would inflict significant harm on schools and libraries and the students and communities they serve. Such an outcome cannot be squared with the fundamental goals of the universal service program. That is why the Commission adopted a five-year limitations period for audits and investigations in the *E-Rate Fifth Report and Order*,<sup>54</sup> but even absent that policy, the circumstances here would make any clawback effort 10 years after the fact fundamentally inequitable. The courts have long recognized the need for agencies to “enforce repose” and to protect parties from unjustified relitigation of settled questions.<sup>55</sup>

Moreover, any requirement that Robeson—one of North Carolina’s poorest counties—now refund disbursements that USAC made in 2007, 2008, and 2009 and that Robeson expended years

---

<sup>54</sup> *E-Rate Fifth Report and Order*, 19 FCC Rcd. 15808, ¶ 33 (recognizing the importance of “provid[ing] [E-rate] beneficiaries with certainty and closure”).

<sup>55</sup> *Cf., e.g., U.S. v. Utah Constr. & Mining. Co.*, 384 U.S. 394, 421-22 (1966) (holding that “[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose”).

ago would cause a severe and unjustified hardship to Robeson, its students, and the entire community. Furthermore, it is completely disproportionate to impose this hardship because of a gift of two college basketball tickets that had no effect on the fairness of the competitive bidding process and that was not subject to any Commission prohibition during the relevant time period.

To the extent the Commission nevertheless finds that a *per se* violation of the competitive bidding rules occurred, Charter requests that the Commission waive its rules “for good cause shown,”<sup>56</sup> as the circumstances here would make “strict compliance” with such a standard “inconsistent with the public interest.”<sup>57</sup> The Commission has granted waivers of competitive bidding requirements for the E-rate program where (i) competitive bidding processes were not compromised by technical rule violations, and (ii) the outcome of the vendor selection processes was otherwise consistent with the policy goals underlying the Commission’s competitive bidding rules.<sup>58</sup> As discussed above, both criteria are met in this case. Robeson selected TWC based on a price that was significantly lower than the other bidder’s. The process was fair and open, and the outcome of the bidding process was the selection of the lowest priced bid, which was unaffected by a one-time gift of sports tickets made *after* TWC had been selected. Therefore, restoring funding in this case would not run counter to the Commission’s goals of combating waste, fraud and abuse. To the contrary, as discussed above, a waiver would strongly promote the

---

<sup>56</sup> 47 C.F.R. § 1.3.

<sup>57</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

<sup>58</sup> See, e.g., *Requests for Review of Decisions of the Universal Service Administrator by Central Islip Union Free School District Central Islip, NY*, Order, 29 FCC Rcd. 2715, ¶ 1 (WCB 2014); *Requests for Review of Decisions of the Universal Service Administrator by La Joya Independent School District La Joya, TX*, Order, 28 FCC Rcd. 7866, ¶ 4 (WCB 2013).

Commission's interest in ensuring that service providers retain incentives to participate in the E-rate program without fear of being subjected to arbitrary, post hoc rescission of critical funding.

**IV. WHILE THERE IS NO LAWFUL BASIS TO REQUIRE REPAYMENT OF ANY PORTION OF THE 2007, 2008, OR 2009 FUNDING AWARDS, IN NO EVENT MAY CHARTER BE HELD JOINTLY AND SEVERALLY LIABLE FOR ALLEGED VIOLATIONS OF GIFT RESTRICTIONS**

As set forth above, there is no basis for any adverse action against Robeson or Charter in connection with the 2007, 2008, or 2009 funding awards. But if the Commission nevertheless determines that revocation of these funds is required, it may not impose joint and several liability on Charter. The Commission and USAC can direct recovery actions only “to the party or parties that committed the rule or statutory violation in question.”<sup>59</sup> Here, the only allegations of non-compliance pertain to *Robeson's* acceptance of gifts in violation of “[Robeson's] district[']s local gift rule policy.”<sup>60</sup> As discussed above, Robeson did not violate that policy, but in all events, there has been no allegation or showing that *TWC* violated the school district policy (and, as noted, there was no Commission prohibition against gifts by service providers during the time frame in question, *see supra* at 17). Therefore, in the event the Commission finds any violation by Robeson (which it plainly should not), there is no lawful basis to shift the resulting liability to Charter.

Subjecting Charter to any recovery action under these circumstances would also risk resulting in an unconstitutional taking. USAC's actions awarding E-rate funds to Robeson led it to procure *TWC's* services at the rate offered in the competitive bidding process. Requiring Charter to return funding for services provided over a decade ago—particularly when Charter has

---

<sup>59</sup> *Federal-State Joint Board on Universal Service*, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd. 15252, ¶ 10 (2004).

<sup>60</sup> Ex. A, 2007 COMAD Letters, Funding Commitment Adjustment Reports at 4; Ex. B, 2008 COMAD Letter, Funding Commitment Adjustment Report at 4; Ex. C, 2009 COMAD Letter, Funding Commitment Adjustment Report at 4.

not violated any rule—would result in the provision of those services well below the company’s costs, contravening a cardinal principle of administrative regulation providing that rates should not be confiscatory.<sup>61</sup> Therefore, allowing USAC to seek recovery from Charter would amount to a confiscation of property without just compensation.<sup>62</sup>

## CONCLUSION

For the foregoing reasons, Charter respectfully urges the Commission to grant this request for review and to direct USAC to reinstate funding with respect to FRNs 1617184, 1618225, 1723535, and 1868150.

Respectfully submitted,

\_\_\_\_\_  
/s/  
Matthew A. Brill  
Elizabeth R. Park  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004

April 24, 2018

---

<sup>61</sup> See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

<sup>62</sup> See, e.g., *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 481-82 (2002) (describing constitutional limits that prevent utilities from being deprived of cost recovery); *Vaqueria Tres Monjitas, Inc. v. Laboy*, No. 04-1840 (DRD), 2007 WL 7733665, at \*38 (D.P.R. July 13, 2007) (finding dairy regulatory scheme to cause a taking by not allowing milk processors “to recover their true costs and the allowance of a fair profit”).

## **DECLARATION OF EVERETTE TEAL**

1. My name is Everett Teal. I am employed as Director of Technology for the Public Schools of Robeson County, North Carolina ("PSRC"). This declaration is based on my personal knowledge and a review of PSRC's records.

2. I have held my current position for more than 12 years. During that time I have had primary responsibility for procuring connectivity services to meet PSRC's educational needs, including through participation in the E-rate program.

3. At the end of 2006, PSRC commenced, under my direction, a competitive bidding process for a multi-year contract to purchase broadband Internet access service. PSRC's request for proposal was open to all providers for 28 days, during which time PSRC received two competing bids.

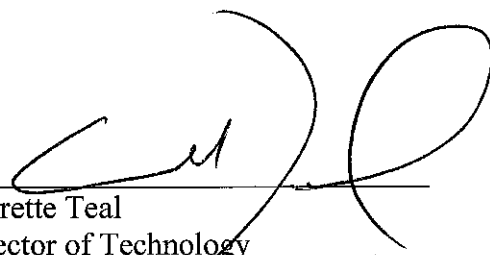
4. After carefully considering the two proposals, PSRC selected Time Warner Cable's proposal. The basis for that decision was the major price disparity between the two bids. In particular, the alternative provider's bid was more than 50 percent higher than Time Warner Cable's bid.

5. On February 3, 2007, I accepted two tickets to attend a college basketball game as a guest of Time Warner Cable. I understood at the time that the tickets were valued at \$35 each and that the total value of the gift was compliant with PSRC policy.

6. Time Warner Cable's offer, and my acceptance, of college basketball tickets was unrelated to, and in no way impacted, PSRC's decision to contract with Time Warner Cable for broadband Internet access service.

I declare that the foregoing is true and correct to the best of my knowledge.

Executed this 18th day of August 2017.



---

Everette Teal  
Director of Technology  
Public Schools of Robeson County

## CERTIFICATE OF SERVICE

I, Kayla Ernst, hereby certify that on April 24, 2018, I caused the foregoing to be served via first-class mail upon the following:

Universal Service Administrative Co.  
Schools and Libraries Program  
Attn: Letter of Appeal  
700 12<sup>th</sup> Street, NW, Suite 900  
Washington, DC 20005  
(also emailed to [Appeals@sl.universalservice.org](mailto:Appeals@sl.universalservice.org))

Mr. Everette Teal  
Public Schools of Robeson County  
P.O. Drawer 2909  
Lumberton, NC 28359  
(also emailed to [Everette.teal@robeson.k12.nc.us](mailto:Everette.teal@robeson.k12.nc.us))

Gina Spade  
Broadband Legal Strategies  
1629 K Street, NW Suite 300  
Washington, DC 20006  
(also emailed to [gina@broadbandlegal.com](mailto:gina@broadbandlegal.com))

*Counsel to Public Schools of Robeson County*

\_\_\_\_\_/s/  
Kayla Ernst